United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,742

UNITED STATES OF AMERICA
Appellee

v.

CLEMENT STRATFORD
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

John V. Long
1000 Woodward Building
Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

May 15, 1970

ISSUE PRESENTED FOR REVIEW*

The sole issue presented for review in this case is whether the conviction of appellant Stratford should be set aside because the trial court denied a timely objection to testimony as to a pre-trial confrontation that was so unnecessarily suggestive as to be conducive to irreparably mistaken identification.

REFERENCES TO RULINGS

None.

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* This case has not been previously before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases*

*Cases chiefly relied upon

TABLE OF AUTHORITIES (Continued)

STATEMENT OF THE CASE

Around 10 o'clock on the morning of Friday, January 10, 1969, complainant Wagner was robbed by three men while he was inside a public lavatory near the Main Public Library on New York Avenue, N. W. The three men took the complainant's watch, coat, jacket, billfold ($14.00), and change purse ($1.15), and they broke the frame of his bifocal glasses at the nose piece while one of them held a knife at the complainant's throat. The complainant promptly reported the robbery to library guards who called the police. Policemen arrived immediately and complainant's description of the alleged assailants was announced on the police radio and reported in writing on a police form as three Negroes (114-121). A few minutes later a police officer in a cruiser arrived, drove complainant to see three suspects a few blocks away at Fifth and Eye Streets, N.W., where, 15 to 30 minutes after the crime had been committed, complainant recognized the three defendants as his assailants because "I knew we were going to see some suspects" (19); because they were surrounded by a large number of police officers on the public street, and because one of the defendants was wearing complainant's coat (20-21). But, instead of three Negroes, two were black and one was white.

It would seem obvious beyond words that the circumstances of this pre-trial confrontation were so suggestive in character as to be conducive to irreparably mistaken identification. The issue, therefore, is whether the "freshness" of the suggestive identification made it a permissible police practice and, even if it represented proper police work, whether evidence of the suggestive but fresh confrontation should have been admitted.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUE

Since the victim-complainant was the only witness to this robbery, the Government's case was based upon (1) his identification of the defendants and upon (2) any inference of guilt that might have derived from disputed evidence of defendants' possession of the stolen property.

1. The Complainant's Eyewitness Account of the Robbery Raises Doubts About the Reliability of the Street-corner Identification

Complainant Wagner testified twice at the trial: once with the jury excluded and once in the presence of the jury. During his testimony in the absence of the jury, he testified that he saw the defendants' faces but could not remember what they took from him individually (14). He said that he looked at the face of the man who held the knife to his throat and the other two who were taking his clothing off (16). He stated on direct examination, "Well, I think I got a very thorough good look at them just once," (17) that he had an opportunity to see their faces again "when we got the things back." (18) That, of course, was on the occasion of the confrontation, the propriety of which is the issue on this appeal.

But, later when complainant Wagner testified in the presence of the jury, he was asked on direct examination if he had an opportunity to see the assailants' faces inside the public restroom, he replied, "Not very well," (43) and he said, "yes" to a direct question as to whether he had an opportunity to see their faces in the lighted stairwell (44). Later, on direct examination before the jury, he was again asked, "Did you have one or more than one opportunity, Sir, to see the faces of these men?" To this question he replied, "I had one good opportunity." (46)

However, since his glasses were broken during the robbery and he had not picked up the two halves of his glasses until after the assailants had fled (46), the one good opportunity to see them was not in the dark restroom at the beginning of the robbery, nor as the men fled up the lighted stairwell at the end of the robbery when his glasses were on the ground, but during the street confrontation half an hour later when he held the two halves of his glasses before his eyes (64). Even with the benefit of the pre-trial confrontation, complainant could not recall any items of clothing worn by defendants other than his own coat worn by the one suspect (71). Although the complainant denied that he was responsible for police reports that all three assailants were Negroes, his detailed description of them to the police was about as vague and non-descript as one can imagine: "... they looked

just like ordinary people; they weren't really tall or real fat; just sort of average;" and without any distinguishing marks (25). And the fact is that the police had stopped and detained two blacks and one white on the basis of a radio call identifying the three assailants as black.

Complainant Wagner's testimony when taken together leaves considerable doubt as to whether he could have identified defendant Stratford before trial in a fair and non-suggestive line-up and hence whether evidence of the fresh street-corner confrontation in this case had any inherent reliability upon which the jury should have been permitted to rely or speculate.

2. Testimony of Officers Kirby and Beach Also Casts Doubt on the Reliability of the Pre-Trial Identification

Sergeant Kirby testified that before he arrived on the scene, he had heard the police radio report that three suspects in this robbery were Negroes (90) and, indeed, that was his initial understanding upon interviewing complainant (99). Sergeant Kirby provided the information for Police Department Form 251 that Wagner was robbed by three blacks; no correction of this form was ever made (97). Sergeant Kirby became aware of his "error" at the street-corner confrontation in issue in this appeal, when he saw that one suspect was white (98-99).

Sergeant Kirby had arrived at the Library five to ten minutes after receiving radio instructions to investigate this robbery. Thus, when he arrived, other police officers already had interviewed Wagner. (94) A few minutes after he arrived, Sergeant Kirby heard on the police radio that car 14 had three suspects at Fifth and Eye, N. W. (95) Officer Beach meanwhile, having seen the suspects on the street before learning of the robbery, previously had interviewed Wagner:

> "I just drove up and asked was it possible one could be white and if there were coats, two coats, involved. He [complainant Wagner] said that is correct and I immediately left." (125)

Officer Beach had promptly returned to Fifth and Eye Streets, where he detained the suspects whom he previously had seen, and sent word by radio that he was holding them. (106-134) It was this message from Officer Beach that came over the police radio, while Sergeant Kirby was interviewing complainant Wagner, to the effect that car 14 had three suspects at Fifth and Eye. (95)

On the basis of this testimony of the police officers, Michael Cramer, Esquire, counsel for defendant Foss, moved for acquittal on behalf of all defendants, pointing out that complainant Wagner had testified out of the jury's presence that he did not know where he was being taken while riding with Sergeant Kirby to Fifth and Eye, and that so far as he could recall no one said to him at any time,

"Could one of them have been white." (31, 134) Officer Beach's conflicting testimony was clear:

a. Officer Beach did ask that question, "could one of them have been white?" (125)

b. Officer Beach asked also whether two coats were involved; (125)

c. Officer Beach indicated he had three suspects in mind. (134, 135)

Thus, the testimony of the two police officers further shows a fortiori the suggestive character of the confrontation at Fifth and Eye Streets.

3. The Testimony of The Three Co-Defendants Conflicted with that of the Government Witnesses

All three defendants took the stand and unequivocally denied that they were the assailants and robbers of Wagner and they denied that Wagner's personal property was ever in their possession. Obviously, the jury disbelieved them and credited the testimony of complainant Wagner and the police officers who testifed that Wagner's personal property was recovered in Wagner's presence at the Fifth and Eye Streets confrontation.

Since the jury would have had little reason to discredit their testimony if the improperly suggestive street-corner confrontation had been excluded from evidence, failure to exclude the

identification was harmful to appellant's case. If failure to suppress be error, the error was not harmless.

ARGUMENT

1. The Street-Corner Confrontation was Suggestive and Conducive to Irreparably Mistaken Identification

The street-corner confrontation was suggestive and hence conducive to the irreparably mistaken identification proscribed by United States v. Wade[1/] and Stovall v. Denno.[2/] The complaining witness testified that when he arrived at the street corner in a police car, the three defendants were surrounded by a great many police officers ("about a million policemen") and he did not notice anyone else in the area. (29-31, 63) Surely, nothing could be more suggestive. This Court's holding in Anthony F. Long v. United States,[3/] requires a finding that the District Court erred in failing to suppress the identification testimony. This Court so held in United States v. Greene:[4/]

> "And, since the Government introduced evidence of the identification made at the uncounselled confrontation as part of its direct case, the deterrent rule of

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1/ 388 U.S. 218 (1967)

2/ 388 U.S. 293, 302 (1967)

3/ ___ U.S.App.D.C. ___, ___F.2d ___, Appeal No. 22,218, December 18, 1969

4/ ___ U.S.App.D.C. ___, ___F.2d ___, Appeal No. 22,923, April 29, 1970

> the Supreme Court in the identification cases commands reversal for a new trial. See Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230, 1234 (en banc), cert. denied, 394 U.S. 964 (1969). Since the Government's case against appellant rested solely on ... [one witness's] identification ... we see no possible room here for operation of the Chapman-Harrington[5/] escape valve ..." (emphasis added) United States v. Greene, supra, at pp. 6 and 7.

2. The Independent Source for Complainant's Identification was Inadequate to Justify or Excuse Inadmissible Identification Evidence

Since complainant Wagner, the sole eye-witness, could not see his assailants very well in the darkened underground men's room while the assault was occurring (43), since his bifocal glasses were broken and on the ground as the robbers departed up the lighted stairwell (46), and since in reality he had only one good opportunity to see them: at the suggestive confrontation (46 and 64), the "independent source" for his in-court identification was inadequate. This inference from his testimony is borne out by the paucity of his physical description of the assailants (25), his inability to describe their garb other than his own clothing on their backs at the confrontation and by the troublesome original report that three blacks had robbed him notwithstanding that one of the three defendants is white.

5/ Harrington v. California, 395 U.S. 250 (1969), Chapman v. California, 386 U.S. 18 (1967)

In Anthony F. Long v. United States, supra, this Court commented as to one witness, the son of the complainant, as follows at p. 8:

> "This is not a case where an independent source may be ascribed to extraneous circumstances, such as prior acquaintance, or to the witness' prolonged opportunity to observe a suspect, or to the fact that observation was made under ideal conditions, etc. ... [appellant observed during chase and never closer than twenty feet]"

But the Court held in Long that admission of the son's testimony nevertheless was not reversible error and did not infect the trial because the complainant himself had "testified that it was not yet dark, that neither robber wore a mask, and that he had a good opportunity to observe their faces especially that of appellant whom he had looked at most of the time the robbery was going on." Op. Cit., p. 2. Therefore, the son's testimony was cumulative, and the "probability" of mis-identification was remote.

Here, there was no such good opportunity to observe at close quarters in daylight and Wagner was the only witness to the crime.

3. The Reliability of Prompt Identification as an Exception to Wade and Stovall

Recently this Court had occasion to express approval of prompt identifications, that otherwise did not meet Wade and Stovall standards, because of their inherent reliability:

> "Our conclusion in Russell[6/] was based upon a general rule that it is not improper for the police immediately to return a freshly apprehended suspect to the scene of a crime for identification by one who has seen the culprit minutes before. We see no reason to reach a different conclusion where, as here, the witness is brought to the suspect ..."
> United States v. Dennis O. Miller, ___ U.S.App.D.C. ___, ___ F.2d ___, Appeal No. 22,332, at fn. 4.

The facts, however, in Miller showed that "identification was not made in impermissibly suggestive circumstances" (Op.Cit., supra, p. 3) for several reasons: (1) complainant "was originally able to observe the robber for several minutes in a well-lit store at noontime;" (2) "appellant when identified was in shirt sleeves, whereas the robber had been wearing a coat, hat and tie during the offense;" (3) another witness was not able to identify appellant at the same confrontation, dispelling the inference of suggestiveness; and (4) appellant was in view almost constantly from the time he was seen

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6/ Russell v. United States, 133 U.S.App.D.C. 77 at p. 81; 408 F.2d 1280 at p. 1284 (1969)

leaving the robbed store until he entered the office where the fresh confrontation took place. Op. Cit., supra, pp. 8 and 9.

Indeed all of the "fresh" identification cases have been justified on similar grounds of independent circumstances showing reliability of the confrontation notwithstanding its suggestive character; or justified on special circumstances that would render a formal line-up difficult or impossible.[7/] There was no continuous observation of appellant here like that of Long and Miller, supra, nor were there any "distinguishing" marks as to any of the three assailants: they just looked like ordinary people except that there was a question as to whether all three were black or only two! And no reason appears here why a fair formal line-up could not have been organized with dispatch in mid-day on a week-day.

7/ E.g., Stovall v. Denno, supra, (victim dying in hospital); Wise v. United States, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), cert. denied, 390 US 964 (1967); Russell v. United States, 133 U.S. App. D.C. 77, 408 F.2d 1280 (1969), cert. denied, 395 US 928 (1969); Solomon v. United States, 133 U.S.App. D.C. 103, 408 F.2d 1306 (1969); Jackson v. United States, 134 U.S. App. D.C. 18, 412 F.2d 149 (1969)

4. The Trial Court Should have Followed the Macklin Case by Carefully Excluding the Street Confrontation Testimony

Denying the motion to suppress the proposed in-court identification, following testimony de hors the jury's presence, Judge Gasch commented "that prompt identifications and [on?] a show-up basis shortly after a crime has been committed have received approval by the Court of Appeals ..." (35), citing inter alia, Macklin v. United States.[8/] But, Macklin was a case in which the improper pre-trial confrontation testimony was suppressed in spite of the "freshness" of the confrontation.

In Macklin the facts were these: Complainant was robbed by two black men of different height, wearing no shirts, one of whom he amply observed during the robbery. Some minutes later, two officers arrested two black men, without shirts, coming through a hole in a fence at a playground two blocks away. Complainant was brought to the playground to confront them. The loot was found nearby. But, the trial judge there, unlike Judge Gasch here, "carefully excluded" the evidence of the playground confrontation. Since the playground confrontation was properly excluded, the in-court identification was proper particularly, said the Court, in view of (1) the "totality of the

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8/ ___ U.S. App. D.C. ___, 409 F. 2d 174 (1969)

circumstances" including complainant's ample opportunity to see appellant, Macklin at the time of the robbery, (2) the "extremely" short time between the crime and the original suggestive viewing "in the immediate vicinity of the crime," (3) complainant's refusal "to make any claim that he could identify the second robber (indicating a lack of any motive, such as vengeance, to name just anyone)," and (4) the fact that the case was tried before Stovall, supra. Thus, the facts in Macklin are indeed very similar to the facts here in that both involve a confrontation a few blocks away shortly after the crime was committed, under suggestive circumstances. Although Judge Gasch erroneously refused here to exclude the sort of confrontation evidence that was properly suppressed in Macklin, the trial judge in Macklin erroneously failed to give the identification instruction given by Judge Gasch here. Had Judge Gasch excluded the confrontation evidence, the Macklin decision suggests that the in-court identification might have been proper in view of the totality of circumstances and since proper identification instructions were given.

Macklin correctly reflects the distinction made in Gilbert v. California[9/] between an in-court identification not tainted by improper out-of-court identification, on the one hand, and an identification,

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9/ 388 US 263; 18 L.ed 2d 1178 at 1986 (1967)

on the other hand, "come at by exploitation of the [primary] illegality."[10/] In Gilbert, the Court took pains to explain that in-court identification may be justified as having been based upon an "independent source" or as "harmless error."

> "Quite different considerations are involved as to the admission of the testimony of the ... witnesses ... that they identified [defendant] Gilbert at the line-up ... the State is therefore not entitled to an opportunity to show that that testimony had an independent source .... That conclusion is buttressed by the consideration that the witness' testimony of his line-up identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial." Gilbert v. California, supra, 388 US at 272 and 273, 19 L.ed 2d at pp. 1186, 1187.

5. The Gilbert Distinction: In-Court Identification and Fresh Confrontations Should be Relegated to their Proper Roles

This distinction in Gilbert between admissibility of in-court identifications and admissibility of evidence of pre-trial identifications has great significance in "fresh" confrontation cases. On the face of it, the social value of increased reliability, afforded by an exception

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10/ Wong Sun v. United States, 371 US 471, 488, 9 L.ed 2d 441, 455 (1963)

allowing fresh confrontations, conflicts often and in the instant case with the Constitutional "right" of a defendant to a non-suggestive line-up with counsel present.

It has been said by a contemporary scholar that new individual Constitutional "rights" are but social rights in disguise and the pretended acrobatics of "balancing interests" represent an inarticulate judicial arbitrariness instead of frank recognition of the true competing social interests.[11/] Here the Court must recognize and deal with the true conflict of social values: between the reliability and practical advantages of fresh confrontations and the dangers of suggestibility and of the lack of restraining influence of counsel. Both the advantages and dangers are relevant to society's interest in convicting the guilty and only the guilty. When the Constitutional bells toll for a fair trial, they toll for me and thee, not for an inherent "right" of a particular defendant who had no such "rights" before Wade and Gilbert were decided in 1967.[12/]

11/ "Rights, Rhetoric and Reality: A New Look at Old Theory," Albert Broderick, The Catholic University of America L. Rev., 133 (1969), Vol. XIX

12/ See then Judge Burger's pre-Wade opinion in Kennedy v. United States, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965) that "there is no right to be viewed in a line-up rather than singly"

The guilt or innocence of appellant here is overshadowed by the importance of development of a rule resolving the conflicting social values.

One of the great values of prompt identification is the enhancement of efficient and rapid police work.

> "Yet prompt identifications seem to be more reliable than stale ones; and by bringing a suspect before witnesses within moments of the crime, the police may be able to release an innocent man apprehended in error, and begin search for the perpetrator of the crime." 13/
> United States v. Miller, supra, at p. 7.

Fresh confrontations are an important adjunct to efficient police work. Yet, fresh confrontations often take place under suggestive circumstances that would be proscribed by Wade and Stovall except for their freshness when a formal line-up would cause significant delay and no court-appointed counsel has been designated. The conflict between such confrontations and the individual "right" of the defendant not to be unfairly tried on the evidence from prompted witnesses must be resolved within the framework of society's paramount interest in convicting only those guilty of the crime. Accommodation

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13/ As in Macklin, supra, the trial court in Simmons v. United States, 390 US 377 at p. 382 (1968), did not permit introduction of fresh pre-trial identification "but relied upon the in-court identification by five eye-witnesses."

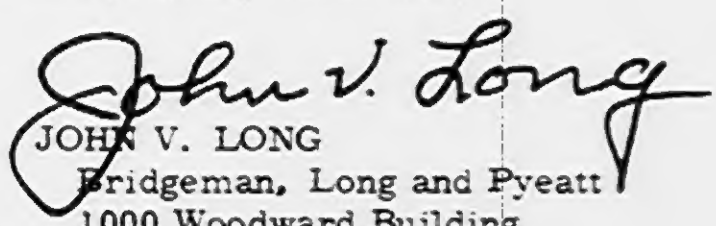
of these competing values is possible by restriction of each value to its proper role. Aiding fast police work by permitting and encouraging on-the-spot confrontations can be limited to its proper role by barring the introduction into evidence of the fact that the suggestive identification has taken place while permitting in-court identification in the same case, on condition there is an independent basis for the in-court identification. The historic view that identification is a matter of weight to be given to evidence may continue to apply to in-court identification if there is a substantial independent basis for the in-court identification. Here, the trier of the facts might properly consider that the in-court identification is worthy of little weight in view of the complainant's limited opportunity to see his assailants well before his bifocals were broken. Stringent requirements for fair line-ups with counsel present have been held necessary in stale confrontations; they are desirable in fresh confrontations; and they should be necessary as a condition of introduction of the fresh identification into evidence.

6. The Conviction Should be Reversed for Failure to Suppress the Evidence of the Fresh Confrontation

The conviction of appellant Stratford should be reversed and remanded for a new trial at which evidence of the suggestive street-corner identification would be suppressed, but in-court identification permitted in view of complainant's minimal independent basis for

identifying defendants. The Court should enunciate this solution as a rule to be followed in all fresh confrontation cases (1) if the rapid identification is required for efficient police work and (2) if circumstances render impractical the use of a non-suggestive line-up with counsel present.

Respectfully submitted,



JOHN V. LONG
Bridgeman, Long and Pyeatt
1000 Woodward Building
Washington, D. C. 20005
Telephone: 638-6545
Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief on the United States Attorney for the District of Columbia, United States District Court, United States Court House, Washington, D.C. 20001, Phillip Hudock, Esquire, Suite 300, 2400 Wilson Boulevard, Arlington, Virginia 22201, counsel for defendant Lonnie E. Barnes, and Charles R. Donnenfeld, Esquire, 1815 H Street, N.W., Washington, D.C. 20006, counsel for defendant Franklin F. Foss, by mailing a copy thereof, first class postage prepaid, this 15th day of May 1970.

John V. Long

JOHN V. LONG